

[illegible]

Defendant Duina is seeking to reduce his sentence, arguing that the enhancement to his guideline sentence for his role in the offense should have been

decided by a jury and not the judge. He relies on *United States v. Booker*, 543 U.S. 220 (2005), for his argument. The Government, in its response, claimed the petition for writ of audita querela should be denied because *Booker* is not applicable to cases on collateral review. *Floyd v. United States*, 40 F.3d 68 (3d Cir. 2005). This court dismissed the petition for writ of audita querela because the writ was an improper form of relief. *See Massey v. United States*, 2009 WL 2902195 (3d Cir. 2009).

The order of October 2, 2009 was premature. The court did not have before it Duina's reply. Duina, not having received the order of October 2, 2009,¹ could not file an appeal. All documents since the filing of the original petition for writ of audita querela have now been considered by this court. Reconsideration of the order of October 2, 2009 has been given. The writ will be denied; however, an amended order will issue thereby allowing Duina to appeal.

s/Sylvia H. Rambo
United States District Judge

Dated: March 26, 2010.

¹The docket shows the order was mailed to Duina. The envelope mailed to Duina was not returned to the court. Why it was not received is unexplainable. The court is giving Duina the benefit of the doubt. His inquiry to the clerk of court as to the status of his petition for writ of audita querela lends credence to his claim that he did not receive the order of October 2, 2009.

UNITED STATES OF AMERICA : **CRIMINAL NO. 1: CR-98-276-01**
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v. :
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JUAN DUINA :

Dated: March 26, 2010.